STATE OF DELAWARE

PUBLIC EMPLOYMENT RELATIONS BOARD

INTERNATIONAL UNION OF ELECTRONIC, SALARIED and MACHINE WORKERS, AFL-CIO,	:	
Charging Party,	:	
and	:	**U.L.P. No. 95-01-113**
KENT COUNTY,	:	
Respondent.	:	

BACKGROUND

The International Union of Electronic, Salaried and Machine Workers, AFL-CIO (hereinafter "IUE") is an employee organization within the meaning of §1302(h) of the Public Employment Relations Act, 19 Del.C. Chapter 13 (hereinafter "PERA").

Kent County (hereinafter "County") is a public employer within the meaning of §1302(n) of the Act.

On December 21, 1994, the IUE filed a representation petition with the Public Employment Relations Board (hereinafter "PERB"), seeking certification as the exclusive bargaining representative of a bargaining unit consisting of all production and maintenance employees of the Kent County Wastewater Treatment facility.

On or about January 15, 1995, the County posted a new work schedule for the Operators at the wastewater plant, to be effective January 30, 1995. Under the existing schedule two operators are permanently assigned to each of the first and third shifts, while the remaining eight (8) operators are assigned to an eight week schedule of which six (6) weeks are spent on the day shift and two weeks of the cycle on the first and third shifts. The new schedule increases the staffing of the first shift (23:00 - 07:00) and the third shift (15:30 to 23:30) from two (2) to four

(4) employees. To accomplish the new schedule, employees B. Vincent and D. McClain are transferred from the rotating schedule to permanent assignments on the first shift and employees G. Keurnere and B. Paolini are transferred from the rotating schedule to permanent assignments on the third shift.

On January 18, 1995, the IUE filed an unfair labor practice charge with the PERB alleging violations of 19 Del.C. §1307(a)(1), (a)(2), (a)(3), (a)(4), (a)(5) and (a)(6), which provide:

> (a) It is an unfair labor practice for a public employer or its designated representative to do any of the following:
>
> (1) Interfere with, restrain or coerce any employee in or because of the exercise of any right guaranteed under this chapter.
> (2) Dominate, interfere with or assist in the formation, existence or administration of any labor organization.
> (3) Encourage or discourage membership in any employee organization by discrimination in regard to hiring, tenure or other terms and conditions of employment.
> (4) Discharge or otherwise discriminate against an employee because the employee has signed or filed an affidavit, petition or complaint, or has given information or testimony under the Act.
> (5) Refuse to bargain collectively in good faith with an employee representative which is the exclusive representative of employees in an appropriate bargaining unit, except with respect to discretionary subjects.
> (6) Refuse or fail to comply with any provision of this Chapter or with rules and regulations established by the Board pursuant to its responsibility to regulate the conduct of collective bargaining under this Chapter.

Specifically, the charge alleges:

> ... This schedule radically alters the current practice, unilaterally changes long established procedures and benefits, and forcibly changes the normal hours of work and shifts of certain employees thereby disrupting their lives. Furthermore, the changes appear to blatantly isolate, intimidate and punish employees who have openly voiced support for the Union in the course of exercising their rights under the Act. [1]

[1] The unfair labor practice charge was amended prior to the opening of the hearing to eliminate allegations of discriminatory and intimidates remarks by one of the Levy Court Commissioners to employees in the proposed bargaining unit.

The remedy requested, among other things, a Temporary Restraining Order preventing implementation of the new schedule by the County.

The County, in its Answer dated January 24, 1995, admitted posting the disputed schedule change but denied all other allegations set forth in the charge.

Because of the impending change in the established work schedule, an emergency hearing was held on Thursday, January 26, and Friday, January 27, 1995. Following the hearing the following order was issued:

> 1. Based upon insufficient proof establishing anti-union animus as a basis for the proposed schedule change, the unfair labor practice charge is dismissed, without prejudice.
>
> 2. In order to protect the rights of employees as set forth in 19 Del.C. §1303, and pursuant to the authority vested in the PERB pursuant to 19 Del.C. §1301(3) and §1308, the County is directed to rescind the shift change scheduled to be effective January 30, 1995, and to maintain the status quo through the certification of the election results.

OPINION

I. Unfair Labor Practice Charge

The IUE asserts that the posting of the new schedule, which transfers four employees to permanent assignments on less desirable shifts and disrupts the work environment, was fashioned and timed to intimidate employees during the pre-election period and was based, at least in part, on anti-union animus. Wilmington Firefighters Association, Local 1590, v. City of Wilmington (Del.PERB, ULP 93-06-085 (1994)) involved allegations of discriminatory and intimidating conduct resulting from union animus. In the *Firefighters* decision, the PERB adopted the underlying rationale set forth in NLRB v. Wright Line (251 NLRB 1083, 105 LRRM 1169 (1980), enf'd 662 F.2d 899 (1st Cir., 1981), cert.denied, 455 US 989 (1982)).

Under the *Firefighters* shifting burden analysis for evaluating allegations of anti-union animus, the charging party must establish that an employee's conduct is protected activity under the Act and that the protected conduct was a substantial or motivating factor in the employer's

adverse employment action. WFFA v. City of Wilmington (Supra.). To establish a *prima facie* case of unlawful discrimination by an employer requires proof establishing (1) that the employee engaged in protected activity, (2) that the employer had knowledge of the protected activities, and (3) that these protected activities were a substantial or motivating factor for the employer's action. The employer can rebut the *prima facie* case either by establishing that prohibited motivations played no part in its decision or by demonstrating that the same action would have been taken for a legitimate business reason, regardless of the protected activity.

Robert Paolini, an Operator at the facility for nine (9) years, was the only employee affected by the proposed schedule change to testify at the hearing. Mr. Paolini testified concerning the impact of the proposed change upon his personal circumstances and his involvement in a prior organizing effort some years earlier. Standing alone, Mr. Paolini's activity during a prior organizing effort does not constitute protected activity insofar as the current organizing effort is concerned.

Without first proving current pro-union activity by those individuals whose shifts were changed, evidence of union activity involving a prior organizing effort is not relevant to the resolution of the issue presented here. In the absence of evidence establishing that the four (4) affected employees were singled out because of their current involvement in protected activity, there is no credible evidence to support a finding that union animus was a substantial or motivating factor for the schedule change.

The County's posting of the January 30 schedule change states the changes were "... to cover the heavier work load once the SAB [*South Aeration Basin*] comes on line." Union Exhibit 1. Testimony and documentation provided during the hearing establish that the Kent County Wastewater Treatment Facility is currently undergoing a major renovation and overhaul. At all times relevant to this charge, the South Aeration Basin has been out of operation while a new bubble diffuser system is being installed. This new system is fundamentally different from the system which the facility currently employs and requires more testing and monitoring by employees. Acting Assistant Plant Manager, Don Williams, and Tom Davis, the Resident

Engineer assigned to oversee the renovation of the treatment facility, testified without contradiction that the manufacturer of the new equipment being installed in the SAB recommends a staffing level of not less than four (4) employees per shift to operate and maintain the new process. This testimony establishes a legitimate business interest for creating a schedule which redistributes manpower and assigns more employees to the first and third shifts.

Because the proof fails to establish, either directly or by inference, the required element of union animus it is unnecessary to weigh the interest of employees in concerted activity against the legitimate business interests of the employer.

The *Firefighters* test also applies to alleged violations of §1307(a)(1), and for the reasons stated above, the (a)(1) allegation is also dismissed. Furthermore the alleged violations of §1307 (a)(2), (a)(4), and (a)(6) are unsupported by convincing evidence, as the record presently exists. Nor is there evidence that any violation of §1307(a)(5), the duty to bargain in good faith, occurred.

For the foregoing reasons, the unfair labor practice charge is dismissed, without prejudice.

II. Temporary Restraining Order

Section 1301 of the PERA, Statement of Policy, provides:

> It is the declared policy of the State and the purpose of this Chapter to promote harmonious and cooperative relationships between public employers and their employees and to protect the public by assuring the orderly and uninterrupted operations and functions of the public employer. These policies are best effectuated by:
>
> (1) Granting to public employees the right of organization and representation;
> (2) Obligating public employers and the public employee organizations which have been certified as representing their public employees to enter into collective bargaining negotiations with a willingness to resolve disputes relating to terms and conditions of employment and to reduce to writing any agreements reached through such negotiations; and

(3) Empowering the Public Employment Relations Board to assist in resolving disputes between public employees and public employers and to administer this Chapter.

Section 1303 of the Act, Public Employee Rights, provides:

> Public employees shall have the right to:
>
> (1) Organize, form, join or assist any employee organization except to the extent that such right may be affected by a collective bargaining agreement requiring the payment of a service fee as a condition of employment.
>
> (2) Negotiate collectively or grieve through representatives of their own choosing.
> (3) Engage in other concerted activities for the purpose of collective bargaining or other mutual aid and protection insofar as any such activity is not prohibited by this Chapter or any other law of the State.
> (4) Be represented by their exclusive representative, if any, without discrimination.

The grant of employee rights set forth in §1303 of the PERA is similar to that set forth in §7 of the National Labor Relations Act of 1935, as amended in 1947. Section 7 provides:

> Employees shall have the right to self-organization, to form, join or assist labor organizations, to bargain collectively through representatives of their own choosing and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid and protection, and shall also have the right to refrain from any or all such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in §159(a)(3).

Interpreting the nature of the rights conferred by and the scope of §7, the National Labor Relations Board in RE: General Shoe Corporation (77 NLRB 124, 21 LRRM 1337 (1948)), determined that conduct not so egregious as to constitute an unfair labor practice may, nonetheless, impugn the integrity of the representation process. The NRLB held:

> ... When we are asked to invalidate elections held under our auspices, our only consideration derives from the Act which calls for freedom of choice by employees as to a collective bargaining representative. [*citing In RE: P.D. Gwaltney (74 NLRB 371, 20 LRRM 1172 (194--)*]
>
> Conduct that creates an atmosphere which renders improbable a free choice sometimes warrant invalidating an election, even though that conduct does not constitute an unfair labor practice. An election can serve its true

> purpose only if the surrounding conditions enable employees to register a free and untrammeled choice for or against a bargaining representative.
>
> ... In election proceedings, it is the Board's function to provide a laboratory in which an experiment may be conducted, under conditions as nearly ideal as possible, to determine the uninhibited desires of the employees. It is our duty to establish those conditions; it is also our responsibility to determine whether they have been fulfilled. *General Shoe, (Supra).*

Although *General Shoe* resulted in the NLRB's voiding the completed election and ordering a second election, the underlying rationale of the decision also serves as a valid basis for enjoining conduct which threatens the election environment prior to the holding of the election. Preserving the neutrality of the environment during the insular period between the filing of a certification petition and the election ensures that employees are fully afforded their statutory right to freely and collectively elect a bargaining representative.

In the present matter, it is undisputed that the completion of the South Aeration Basin originally scheduled for mid-January, 1995, is behind schedule. Acting Assistant Plant Manager Williams testified that he believed the project would be completed sometime in mid-February. Resident Engineer Davis, an employee of Whitman, Requandt & Associates, the design engineering firm contracted by the County, who is the on-site engineer responsible for this project, testified completion of the project would not occur until the end of February, 1995, at the earliest.

Mr. Davis has the closest continuing association with the progress of the SAB project. It is his responsibility to assure compliance with the contract requirements and specifications. Considering his testimony that the start-up of the South Aeration Basin will not occur before the end of February and the testimony of the various witnesses concerning the training required of the employees once the SAB is operational, the completion of the SAB does not constitute an overriding business concern warranting implementation of the new schedule on January 30, 1995.

Mr. Williams and County Engineer Kamran Pahlavan further testified that the need to assure a safe work environment and to minimize overtime also contributed to the changes in the work schedule.

The record contains no evidence of a recent history of safety problems attributable either in whole or in part to the current method of scheduling the operators. The current schedule has been in place since approximately November, 1993.

The reduction of overtime was a goal when the existing schedule was implemented. No evidence was presented that continuing the current schedule places upon the County an undue hardship in the short term insofar as overtime is concerned.

For these reasons, it is not unreasonable for the employees to perceive that the schedule change posted in the midst of an organizational campaign is retaliation by the employer. This perception is reinforced by the fact that at least some of the reassigned employees were involved in a prior organizational effort.

In the absence of a compelling business justification, to permit the disputed schedule change to be implemented during the pre-election period would reinforce the employees' belief and fear that engaging in protected activity justifies the otherwise unwarranted treatment of those involved, and in so doing has the very real potential to taint the election process.

For this reason, a Temporary Restraining Order is issued requiring the County to rescind the schedule change and to maintain the status quo through the certification of the election results.

/s/Charles D. Long, Jr.
CHARLES D. LONG, Jr.
Executive Director
Del. Public Employment Relations Bd.

/s/Deborah L. Murray-Sheppard
Deborah L. Murray-Sheppard
Principal Assistant
Del. Public Employment Relations Bd.

DATED: February 1, 1995